Supreme Court, U.S.
FILED
MAR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1225

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT L. KRAUSE,

Petitioner,

v.

MARK K. KIM, M.D. d/b/a)
MARK K. KIM, M.D., P.A.)
and METROPOLITAN MEDICAL)
CENTER, a Corporation)
)
LAWRENCE A. FARBER, M.D.)
and NORAN NEUROLOGICAL)
CLINIC, P.A.),

Respondents.

PETITIONER'S REPLY MEMORANDUM

Robert L. Krause
Attorney Pro Se
8131 Westwood Hills Drive
St. Louis Park, MN 55426
(612) 545-3931

TABLE OF CASES

McKaskle v. Vela, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed. 2d 195 (1984).

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L.Ed. 2d 392 (1981).

The thrust of each Respondent's Brief in Opposition is the claim that Petitioner failed to raise the federal issues in the state courts, and that the decisions of the state courts were decided upon independent and adequate state grounds. The Respondents are mistaken.

Petitioner brought a timely Motion before the District Court for relief from judgments based on Rules 60.01 and 60.02 of the Minnesota Rules of Civil Procedure for District Courts. Petitioner's moving papers explicitly referred to federal constitutional provisions (e.g., that relief should be granted "...in the Interest of Justice, Upon Consideration of Due Process, Equal Protection, and Fundamental Fairness"). Petitioner emphasized, in oral arguments before the District Court, the

Constitutional issues, including the denial of jury trial. These issues were of central importance on appeal.

Petitioner's Statement of the Case to the Minnesota Court of Appeals specifically stated, at p. 2, that Petitioner would raise as issues on appeal the denial of equal access and due process. Before the merits could be heard, Respondents moved to dismiss the Appeal. Petitioner's constitutional issues were implicit in his replies to the Motion to Dismiss responses.

It is true that the Minnesota Court of Appeals, in its decision affirming the District Court's denial of Petitioner's motion, did not address Petitioner's federal (constitutional) issues. That Court also failed to address the 60.02 aspect of petitioner's

motion and appeal and mischaracterized the motion as being based (solely) on clerical error.

The Court of Appeals ignored entirely Petitioner's arguments based on mistake, misrepresentation and the other grounds permitting relief under Rule 60.02, and similarly ignored the constitutional issues.

The totality of the record in the courts of Minnesota demonstrates that federal constitutional issues under the First, Seventh and Fourteenth Amendments of the U.S. Constitution were consistently before the Court, even prior to the raising of the Rule 60 Motion by Petitioner. The lack of transcripts for the initial crucial hearing before the trial court on December 27, 1984, and for the hearing on the Rule 60 Motion occurred despite Petitioner's efforts,

and the lack of a proper record caused by the lack of those transcripts should not bar Petitioner's request for review.

The record as a whole shows that the federal issues were raised below.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryant V. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897).

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981), at

496.

Accordingly, review of the decisions below is appropriate. This is true even if all arguments raised on Petition for Certiorari were not explicitly dealt with by the state courts. McKaskle v. Vela, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed. 2d 195, (1984).

The next and related issue is whether or not the court below decided adversely to Petitioner on independent and adequate state grounds. Clearly they did not. The Court of Appeals ignored the 60.02 aspect of Petitioner's Motion as well as they ignored the constitutional infirmities of the prior proceedings. The cumulative effect of the disparate treatment of Petitioner and of the violation of his constitutional rights, colored the entire pro-

ceedings and made it impossible for a decision of the merits to occur.

Petitioner has been erroneously characterized as arguing the constitutionality of the Summary Judgment rule. He has not made that argument. There are instances where summary judgment is appropriate. Petitioner is arguing that in Petitioner's particular cases summary judgment was inappropriate, and the granting of summary judgment (1) before discovery was completed, (2) ignoring the operative dates for statute of limitation purposes which differed from the last dates Petitioner visited the Respondent Doctors, and (3) based on the unilateral affidavit of a Respondent's attorney, was unconstitutional as violative of Petitioner's 1st, 7th and 14th amendment rights.

As discussed above, Petitioner did present federal questions to the Minnesota Appellate Courts, and the allegations to the contrary in each of the Respondent's briefs is wrong. The decision of the court of appeals was based on the mistaken belief Petitioner's motion in the District Court, was based solely on clerical error (Rule 60.01). The independent and adequate state ground for ruling against Petitioner would have been present if the Motion had been based solely on clerical error. It was not. The appellate court's ruling based only on that criteria was not adequate. In fact, by ignoring Petitioner's 60.02 arguments and supporting documents, the state courts further violated Petitioner's due process/equal protection rights.

Petitioner disputes not only the legal conclusions set forth in the Respondent's Briefs in Opposition, but also points out that there are mistatements by Respondents in allegations of fact. For example, the Brief of Respondents Farber, et al., is wrong in claiming (at p. 2) "Petitioner does not claim that the trial court failed to accept, at the time of (Dec. 27, 1984) hearing, any documents that are at all relevant to his claim against Dr. Farber and the Noran Clinic".

Petitioner, as a pro se litigant, is entitled to recieve his "day in court". The rights of pro se litigants--prisoners, the poor, and those who choose to proceed as their own counsel--are at stake. Petitioner is aggrived because the disparate treatment* he received resulted in the dismissal of his

lawsuits and resulted in the disregard of his proper Motion for post-judgment relief under Rule 60.01 and 60.02, Minn. Rules of Civil Procedure. The U.S. Supreme Court can, by granting this Petition for Writ of Certiorari, give light to this Petitioner, and hope to all pro se litigants that a just and proper claim by any litigant can and will get serious and impartial consideration by the Court, in keeping with the ethical standards of the judiciary and in line with the basic principles of the United States Constitution.

*See Appendix annexed hereto giving examples of disparate treatment to Petitioner and the extreme delaying tactic of Respondents.

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATE OF MINNESOTA
DISTRICT COURT OF MINNESOTA
FOURTH JUDICIAL DISTRICT

CHAMBERS OF
JUDGE ROBERT E. BOWEN
COURTS TOWER
GOVERNMENT CENTER
MINNEAPOLIS, MINN 55487

June 21, 1985

Clerk of Appellate Courts
230 State Capitol Building
St. Paul, Minnesota 55155

RE: Court of Appeals File Nos. C6-85-989, C2-85-990 Robert L. Krause v. Mark K. Kim, et al, Robert L. Krause v. Lawrence A. Farber, et al

Dear Sir:

I have had forwarded to me by attorney Thoelke, who is representing the appellant in the above-entitled matter copies of appellant's statement of the proceedings in each of the above-named cases.

I have declined to approve either of the appellant's proposed statements and have instead approved the objections in your file C6-85-989 and the respondents' statement of the proceedings in your file C2-85-990.

These matters were decided on motions for summary judgment, and therefore the basis for the decision in each case is, as it must be, in the file.

Yours very truly,

Robert E. Bowen

REB/jhr
cc: David Thoelke
Rebecca Moos
Robert Salmon

April 5, 1982

Keith A. Dunder
Mahoney, Dougherty and Mahoney
801 Park Avenue
Minneapolis, MN. 55404

Re: Mark A. Kim, M.D. and
Metropolitan Medical Center

Dear Mr. Dunder:

I am writing to you in regard to your letter of March 26, 1982. I wish to clarify your interpretation of our telephone conversation and the purpose of my call as follows:

1) I did not state I wished to proceed on a generally informal basis than that of normal discovery proceedings.

2) You did not inform me that you may be willing to proceed on a more informal basis in certain areas if it would result in substantial savings in time and expense.

3) I did not inform you that I believed I had gathered all the facts pertinent to my claim.

The purpose of my call and what I <u>did</u> say are as follows:

1) I called to inform you I had received the interrogatories.

2) The purpose of the call was to:

   a. Present the possibility to review certain records and documents that we could <u>mutually</u> agree upon during the discovery process. Those records and documents so agreed to be reviewed at a convenient time and <u>mutually</u> agreed upon.

   b. Possible additional records and documents relevant to the subject matter of the action, again mutually agreed upon, could be produced at another date and time convenient to both.

   c. Any records and documents requested to be produced by either that possibly would be disputed, hopefully none, would at least be specifically identified and then ruled on by the court.

d. Acknowledgement under oath by both consistent with normal discovery proceedings.

e. Depositions scheduled by mutual agreement.

f. Identify and narrow the issues by a conference.

3. I did state that I had my medical records from the Metropolitan Medical Center with the exception of a brain scan and report that were destroyed. These are available to me without legal action by 1977 Minnesota Statutes 144.33 - access to health records before filing this action.

I tried to make it clear exactly how I wished to proceed, but you were not receptive to any suggestions - I surmise because of my filing this action pro se.

Your statement in your letter,

> " you also informed me that you believed you have all the facts pertinent to your claim, which you have been gathering by personally investigating the matter by interviewing staff personnel at Metropolitan Medical Center".

is obviously incorrect. I will respond by asking you a question. If I had all the facts I need, why would I be calling you in the first place? I will now start my discovery process.

My contacts with the Metropolitan Medical Center personnel was entirely limited to anything relating to my health records, in and out patient, and in the Dr. Kim Pain Clinic. If you have any information to the contrary please write to me.

Your statement,

> "In light of your ongoing investigation, and the confusion which is bound to result because you are representing yourself in this matter, I suggest that it may be easier in the long run to proceed with the discovery on a formal basis".

now after receiving your letter, additional interrogatories, I will agree. It will be substantially more expensive for your client and to a lesser degree for myself. Anyway, I tried.

I will timely answer your interrogatories. I am sorry you said you are not willing to extend normal attorney courtesies to me as attorney pro se. I, therefore, will not extend them to you. Please make all contacts with me by letter or memo. More expense results to your client, but less for me under the circumstances.

I am a management consultant with thirty-five years of experience in business including numerous medical and legal practices. Substantial savings of time and money were obvious. I have now concluded that I will benefit by the posture you have taken. For your information, it is better for me because I will now be very formal, but will arrange everything to fit my convenience. I will not have difficulty adjusting to your demands. If I find it impossible to meet your demands I will seek relief in court.

I will proceed with this case immediately with the assistance of a consulting attorney. I will proceed in a very polite efficient manner. My hope is that you will act likewise in the future. You can assume I will continue to proceed according to the Minnesota Rules of Court. If you have any complaints please write to me and I will respond accordingly.

I wish to go on record that all the personnel of the Metropolitan Medical Center on each and every occasion, whether in person or on the telephone, have been polite, pleasant and efficient. I wish to compliment the hospital accordingly. The responsibility for the problems in this case can now unfold in the discovery process. I am sorry I was forced to take this action.

I am enclosing a copy of this letter to Mark G. Mishek, Director of Legal Services and to Frank Larkin, Executive Vice-President of Operations of the Metropolitan Medical Center for their information. All subsequent contact will be directed only to you.

Yours very truly,

Robert L. Krause
Attorney Pro se
8131 Westwood Hills Drive
St. Louis Park, MN. 55426
612-545-3931

cc: Mark G. Mishek
Director of Legal Services
Metropolitan Medical Center
900 South Eighth Street
Minneapolis, MN. 55404

cc: Frank Larkin
Executive Vice-President of Operations
Metropolitan Medical Center
900 South Eighth Street
Minneapolis, MN. 55404

State of Minnesota,

County of Hennepin

DISTRICT COURT

Fourth Judicial District

Robert L. Krause,

Plaintiff

vs.

Mark K. Kim, M. D. d/b/a Mark K. Kim, M. D. P. A. and Metropolitan Medical Center, a Minnesota Non-Profit Corp.

Defendants

Notice of Taking Deposition

FILE NO.

TO: Defendant Metropolitan Medical Center and its attorney, Keith A. Dunder, 801 Park Avenue, Minneapolis, MN 55404

PLEASE TAKE NOTICE, That the deposition of Frank Larkin, Executive Vice-President of Operations, Metropolitan Medical Center, Minneapolis, Minnesota, by oral examination will be taken before MARY ELLEN SPOTTS or any qualified notary public at Room 1251, Hennepin County Government Center in the City of Minneapolis in the County of Hennepin, State of Minnesota, on the 4th day of June 1982 at 9 o'clock A. M., and thereafter by adjournment until the same shall be completed.

April 30th, 1982

Attached hereto and made a part hereof is Plaintiff's Request for Production of Documents and Objects.

MARY ELLEN SPOTTS
Registered Professional Reporter
304 9th S.E.
Minneapolis, Minnesota 55414
Phone: 378-9047

By
Robert L. Krause, Plaintiff
Attorney and as
8131 Westwood Hills Drive
St. Louis Park, MN

Speed Messag.

To MR KEITH DUNDAS
MAHONEY, DOUGHERTY & MULLIN
431 PARK AVE
MINNEAPOLIS, MN. 55404

From Robert L Krause
8131 WESTWOOD HILLS DR
ST. LOUIS PK, MN 55426

Subject KRAUSE V. METROPOLITAN MEDICAL CENTER

Date 5-14 1982

THIS IS IN REPLY TO YOUR REQUEST FOR A CONTINUANCE OF THE ARVIN DEPOSITION SCHEDULED FOR JUNE 4, 1982.

IT APPEARS TO ME THAT YOU ARE CONSCIOUSLY AVOIDING COMPLIANCE WITH MY REASONABLE DISCOVERY REQUEST. IN VIEW OF YOUR CONDUCT (e.g. THAT YOU PREDICT 3 WEEKS PRIOR TO THE DUE DATE, THAT YOU WILL NOT PRODUCE THE REQUESTED DOCUMENTS), I CANNOT ACCEDE TO THE REQUESTED CONTINUANCE. DISCOVERY MUST GO FORWARD IN THIS CASE, DESPITE YOUR EFFORTS TO DELAY.

I WILL BE SENDING YOU A NEXT WEEK MY SUPPLEMENTAL [illegible] AND RESPONSES TO YOUR LETTER DATED MAY 6, 1982.

I LOOK FORWARD TO SEEING YOU ON JUNE 4, 1982.

cc: REBECCA EGGE MAAS

Signed Robert L Krause

Wilson Jones

MAHONEY, DOUGHERTY AND MAHONEY
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
801 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404-1109
(612) 339-9063

OF COUNSEL
VERNON J. SCHMIDLIN

G. P. MAHONEY (1910-1983)
G. J. MAHONEY (1923-1987)

RICHARD P. MAHONEY
THOMAS E. DOUGHERTY
JAMES M. MAHONEY
KENNETH GLASGOW
DALE B. LINDMAN
GARY C. BISTRO
RAYMOND M. HOLD
PATRICK J. BISTRO

KEITH A. DUNDER
SANDRA J. GILBRANDS
PATRICK E. MAHONEY

January 2, 1985

Mr. Robert L. Krause
8131 Westwood Hills Drive
St. Louis Park, Minnesota 55426

Re: Robert L. Krause v.
Metropolitan Medical Center
Our File No. 80-2010

Dear Mr. Krause:

This will confirm our conversations of December 21 and 26 in which you indicated your desire to take the deposition of Mr. Frank Larkin, the Chief Executive Officer at Metropolitan Medical Center. As I advised, I fail to see what relevant information or evidence would be gained from such a deposition. We do not intend to produce Mr. Larkin for a deposition unless you can make some reasonable showing that there is relevant evidence or information to be gained by it, and we will therefore move to quash any scheduled deposition of Mr. Larkin.

Very truly yours,

MAHONEY, DOUGHERTY and MAHONEY

Keith A. Dunder

KAD:joo

cc: Rebecca Moos
Mark Peterson

EXHIBIT A

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

'85 JAN 25 AM 11:57

BY HENN. CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Robert L. Krause,

Plaintiff,

vs.

FILE NO. 801270

ORDER

Lawrence A. Farber, M.D., and Noran Neurological Clinic, P.A.,

Defendants.

Robert L. Krause,

Plaintiff,

vs.

FILE NO. 785809

ORDER

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

The above-entitled Matter came duly on for hearing before the undersigned, one of the Judges of the above-named Court, at Special Term thereof on the 23rd of January, 1985, upon the Motion of Plaintiff for an Order compelling the Defendant Metropolitan Medical Center to produce its Chief Executive Officer to be deposed by Plaintiff no later than January 28, 1985; for an Order compelling Defendant Metropolitan Medical Center to produce documents pursuant to Plaintiff's May 3rd, 1982, request for production of documents; for an Order consolidating two other files with

the instant file; and for an Order awarding the Plaintiff the reasonable expenses he incurred in bringing this Motion. Defendant Metropolitan Medical Center brought a Countermotion for a Protective Order pursuant to Min. R. Civ. P. 26.03.

Robert L. Krause appeared pro se.

Keith A. Dunder, Esq., appeared for and on behalf of Defendant Metropolitan Medical Center.

Based upon all the files, records, and proceedings herein, the Court, having been fully advised in the premises,

IT IS HEREBY ORDERED:

1) That Defendant Metropolitan Medical Center produce Frank Larkin for deposition by Plaintiff on or before February 8, 1985.

2) That Plaintiff's Motion for an Order compelling Production of Documents is, in all respects, denied.

3) That Plaintiff's Motion to consolidate Hennepin District Court Files numbered 772726 and 773046 with the instant file is, in all respects, denied.

4) That Plaintiff's Motion for his expenses incurred in bringing this Motion is, in all respects, denied.

5) That Defendant Metropolitan Medical Center's Countermotion for a Protective Order is, in all respects, denied.

BY THE COURT:

Peter J. Lindberg
Judge of District Court

Dated: 1-24-85

February 21, 1985

Mahoney, Dougherty and Mahoney
801 Park Avenue
Minneapolis, MN 55404-1189

Re: Krause vs. Metropolitan Medical
Center, et al.
File No. 82-2010

Dear Mr. Dunder:

I have reviewed my notes from the recent deposition of Frank Larkin, and thought I should write you this brief note, sharing my reflections.

First, although I have of course not yet seen the transcript, it is my impression that your conduct at the deposition went far beyond that necessary to protect your client. It's my recollection that you were making a conscious effort to confuse the issues, to thwart my efforts to obtain information Mr. Larkin could and should have revealed , and generally to harass my efforts to develop my case.

I found your conduct offensive — not only to me personally, but to the quest for truth that should be at the heart of the judicial process.

Whether you disrespect pro se litigants, or dislike me personally, or whatever, I invite you to set aside your prejudices and henceforth cooperate with me to expedite the readying of this case for trial — extending no less courtesy than you would to an attorney at law. I can assure you that I have brought my claim in good faith to redress wrongs done to me. I will not abandon what I feel is a legitimate grievance because of harassment or brow-beating.

Second, conduct as demonstrated in your unilaterally scheduling Mr. Larkin's deposition for February 20th, in blatant disregard of Judge Lindberg's Order and of my schedule, will no longer be tolerated. I will be accommodating and cooperative

Third, this is to confirm that I have, by my previous correspondence to you, complied with Judge Rosen's Order requiring disclosure of expert witness names relevant to my cause of action against your client. My experts will testify regarding issues of duty, breach of duty and causation in establishing our prima facie case of negligence.

Fourth, this is my formal request that you produce the following documents as you agreed at Mr. Larkin's deposition. Additional documents may be requested after reading the deposition transcript.

1. Minutes of the executive committee of the medical staff relating to the approval and subsequent reports relating to the outpatient pain clinic relating to acupuncture.

2. Correspondence, reports or any other data relating to the formation and operation of the hospital service of acupuncture.

Fifth, I would like to complete the taking of Mr. Larkin's deposition in the near future, at my office in view of the uncomfortable and unavailable conference space causing two moves.

Yours very truly,

Robert L. Krause

Robert L. Krause
8131 Wentwood Hills Drive
St. Louis Park, MN 55426

State of Minnesota)
)
County of Ramsey)

David J. Thoelke, being first duly sworn upon oath, states:

1. That I am an attorney at law, licensed in the State of Minnesota, with office at 806 Pioneer Building, Saint Paul, Minnesota 55101.

2. That I have known Robert L. Krause for approximately two and one-half years.

3. That from my acquaintance with Mr. Krause, I have learned that he has, on prior occasions, represented himself as attorney pro se. One such occasion involved a business matter, another involved a civil matter in which he was a defendant. To the best of my knowledge, prior to the present two pending matters, he has not represented himself in a personal injury type action.

4. That he has been a Plaintiff, in a personal injury matter represented by counsel, on one previous occasion, to my knowledge. That cause of action arose out of a traffic accident in Hennepin County in 1976.

5. That my practice does not involve the trial of malpractice or personal injury matters. Accordingly, I have recommended to Mr. Krause that he retain an attorney to represent him in the two pending medical malpractice actions. I have declined to represent him as his attorney in said matters.

6. That I have consulted with and advised Mr. Krause on matters unrelated to the present pending actions.

7. That I have assisted Mr. Krause in the preparation of documents in connection with the two pending actions, and have answered questions he has asked, from time to time. My purpose in doing this has been to give him needed assistance until such time as he obtains counsel to represent him.

Such assistance has been requested and given on an ad hoc basis. I verily believe that Mr. Krause could use the assistance of an attorney at depositions and proceedings before the Court to discuss options with him, recommend objections to questions or procedures, and to answer questions on procedural matters that will confront Mr. Krause as a pro se litigant. Such assistance is necessary to prevent him from being at a great disadvantage in dealing with experienced trial attorneys. Having such assistance will expedite proceedings throughout by resolving confusion about procedural matters and by providing guidance which may help this pro-se litigant focus on the issues involved, and avoid getting off on tangents.

8. That Mr. Krause has consulted with or received advice from other attorneys in St. Paul and Minneapolis relative to the two pending cases.

9. That Mr. Krause, I believe, has the right to proceed pro se without giving up the right to obtaining procedural or technical advice from an attorney, just as he has the right to consult lawbooks and other sources of information.

10. That I verily believe that Mr. Krause is sincere, that he has brought the present actions in good faith, and that he may prevail in one or both of the two pending actions.

11. That I will not be attending the hearing scheduled in the two matters on May 19, 1983, as such attendance would have no value unless and until the Court grants the second part of Plaintiff's Motion, and allows the limited participation right which Mr. Krause seeks.

Further Affiant saith naught.

David J. Thoelke

Subscribed and sworn to before me this 18 day of May, 1983.

Notary Public